UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HENRIETTA PINCKNEY,

Plaintiff,

v.

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant.

05 Cv. 5652 (BSJ)

Order

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Plaintiff Henrietta Pinckney ("Pinckney") brings this action pursuant to 42 U.S.C. § 405(g) seeking judicial review of the Commissioner of Social Security's determination that she was not eligible for Supplemental Security Income ("SSI") benefits based on disability. Defendant, the Commissioner of Social Security ("the Commissioner"), has moved for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. Plaintiff has cross-moved for judgment on the pleadings.

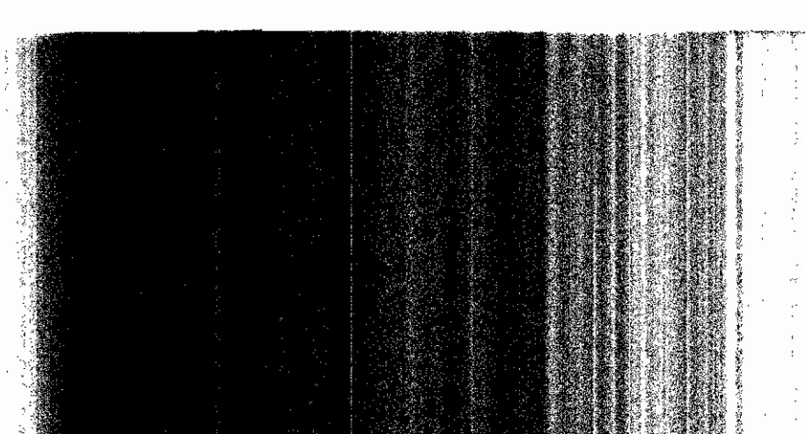
This matter was referred to Magistrate Judge Theodore H. Katz for a Report and Recommendation ("R&R") in accordance with 28 U.S.C. § 636(b)(1)(B) and (C). In his R&R dated October 10, 2006, the Magistrate Judge recommended that the Commissioner's

decision denying Plaintiff's disability claim be reversed and remanded for the calculation of benefits.

The Commissioner timely filed objections to the R&R, arguing that (1) the Administrative Law Judge ("ALJ") properly found that Plaintiff's past relevant work was as a hospital admitting clerk and that this work was sedentary; and (2) if the Court does reverse the Commissioner's decision, the matter should be remanded to the ALJ for the review of evidence obtained after the ALJ's initial decision.

Discussion

Pursuant to 28 U.S.C. § 636(b)(1), the Court reviews de novo any portions of a magistrate judge's R&R to which a party objects. Other portions of the report will be adopted by the Court unless they are clearly erroneous. See Fed. R. Civ. P. 72(b); Thomas v. Arn, 474 U.S. 140, 149 (1985); Greene v. WCI Holdings Corp., 956 F. Supp. 509, 513 (S.D.N.Y. 1997). Parties filing objections are required to "'pinpoint' specific portions of the report to which [they have] objected . . . ." Camardo v. General Motors Hourly-Rate Employees Pension Plan, 806 F. Supp. 380, 382 (W.D.N.Y. 1992).



A. Standard of Review

Pursuant to 42 U.S.C. § 405(g), the Court has the "power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing." If the ALJ has applied proper legal principles, "judicial review is limited to an assessment of whether the findings of fact are supported by substantial evidence; if they are supported by such evidence, they are conclusive." Parker v. Harris, 626 F.2d 225, 231 (2d Cir. 1980). Sufficient substantial evidence consists of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (internal quotations omitted).

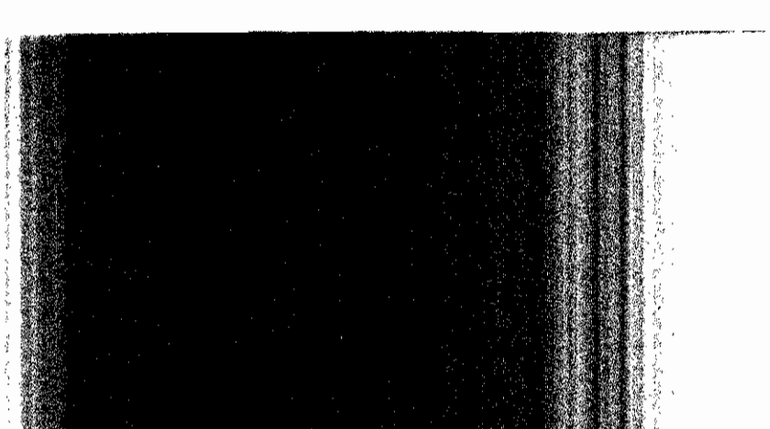
It is the ALJ's duty to "resolve evidentiary conflicts and to appraise the credibility of witnesses, including the claimant." Carroll v. Secretary of Health and Human Services, 705 F.2d 638, 642 (2d Cir. 1982). In determining whether the Commissioner's decision is supported by substantial evidence, the Court reviews the entire administrative record. See Perez v. Chater, 77 F.3d 41, 46 (2d Cir. 1996). This review includes "examining evidence from both sides because an analysis of the substantiality of the evidence must also include that which

detracts from its weight." Williams v. Bowen, 859 F.2d 255, 258 (2d Cir. 1988). See also Tejada v. Apfel, 167 F.3d 770, 774 (2d Cir. 1999).

"Where there is a reasonable basis for doubt whether the ALJ applied correct legal principles, application of the substantial evidence standard to uphold a finding of no disability creates an unacceptable risk that a claimant will be deprived of the right to have her disability determination made according to the correct legal principles." Schaal v. Apfel, 134 F.3d 496, 504 (2d Cir. 1998) (internal quotations omitted). The Court's review of a crabbed reading of the record by the ALJ is guided by the principle that "[t]he Social Security Act is a remedial statute which must be liberally applied; its intent is inclusion rather than exclusion." Vargas v. Sullivan, 898 F.2d 293, 296 (2d Cir. 1990) (internal quotations omitted).

The Court may reverse the Commissioner's finding and award benefits only if applying "the correct legal standard could lead to only one conclusion." Schaal, 134 F.3d at 504. The Court may order the payment of benefits when "the record provides persuasive proof of disability and a remand for further evidentiary proceedings would serve no purpose." Parker, 626 F.2d at 235.

B. Past Relevant Work Description and Level



The Magistrate Judge found that the ALJ, in determining Plaintiff's past relevant work experience, improperly relied on a Dictionary of Occupational Titles ("DOT") generic occupational classification, and seized upon only a subset of Plaintiff's former job duties given during testimony, which together constitute a failure to apply the proper legal standard. Plaintiff's testimony, the Magistrate Judge found, may well describe a job that more closely matches the position of "transporter, patient" which has a moderate activity level, not "hospital admitting clerk," which has a sedentary work level.

Defendant claims that "hospital admitting clerk" was the appropriate past relevant work experience for the following reasons: (1) The job title "hospital admitting clerk" is not generic in the sense of the examples given in Social Security Ruling ("SSR") 82-61, "delivery job," and "packaging job," which are more broad; (2) Plaintiff described her own job in testimony as "hospital admitting representative" and mentioned some of the duties listed in the DOT; (3) Of the two job descriptions -- Hospital Admitting Clerk and Patient Transporter - the DOT job code for admitting clerk included both clerical duties and the task of escorting patients, whereas the DOT code for Patient Transporter omits entirely many of Plaintiff's clerical duties; (4) the applicable standard for past relevant work experience is the job as it is performed in the national economy, not the

Plaintiff's past work, even if Plaintiff's particular job involved excessive functional demands.

Under SSR 82-61, "[f]inding that a claimant has the capacity to do past relevant work on the basis of a generic occupational classification of the work is likely to be fallacious and unsupportable." Social Security Ruling 82-61, 1982 WL 31387 (S.S.A. 1982). Of the various available sources of evidence, "the [claimant] is the primary source for vocational documentation, and statements by the [claimant] regarding past work are generally sufficient for determining the skill level, exertional demands and nonexertional demands of such work." Guadalupe v. Barnhart, No. 04 CV 7644 HB, 2005 WL 2033380, at *5 (S.D.N.Y. Aug. 24, 2005) (quoting Social Security Ruling 82-62, 1982 WL 31386 (S.S.A. 1982)). Composite jobs which "have significant elements of two or more occupations and, as such, have no counterpart in the DOT," should be "evaluated according to the particular facts of each individual case." SSR 82-61. Relying only on a subset of a claimant's job duties to describe past relevant work is improper. See French v. Apfel, 62 F. Supp. 2d 659, 664 (N.D.N.Y. 1999).

The ALJ's classification of Plaintiff's job as "hospital admitting clerk" performed at the sedentary level failed to consider the claimant as the primary source for vocational documentation. Whether or not the DOT description was

"generic," the ALJ relied on this label instead of Plaintiff's complete testimony. Plaintiff's use of the phrase "admitting representative" during testimony is only part of the evidence and does not authorize discounting the rest of her testimony, including the duties Plaintiff mentioned that do not fall under this label. According to Plaintiff's uncontradicted testimony, transporting and lifting patients constituted the preponderance of her work activity -- five out of eight hours daily -- and entailed an exertion level beyond sedentary. (Tr. 34.)

In hewing to the standard of the work as performed in the national economy, Defendant assumed that those aspects of Plaintiff's job that fell outside the DOT description for hospital admitting clerk constitute excessive functional demands rather than essential job functions, even though, according to uncontradicted testimony, they made up the preponderance of Plaintiff's daily work. Rather than considering the entirety of Plaintiff's job duties described in testimony, the ALJ accepted the DOT description of "hospital admitting clerk" and then found extraneous those aspects of Plaintiff's testimony that fell outside it. In so weighing Plaintiff's testimony, the ALJ used the DOT as a primary, rather than corroborative, determinant and Plaintiff's testimony as a corroborative rather than primary source. Accordingly, this Court finds the ALJ's classification

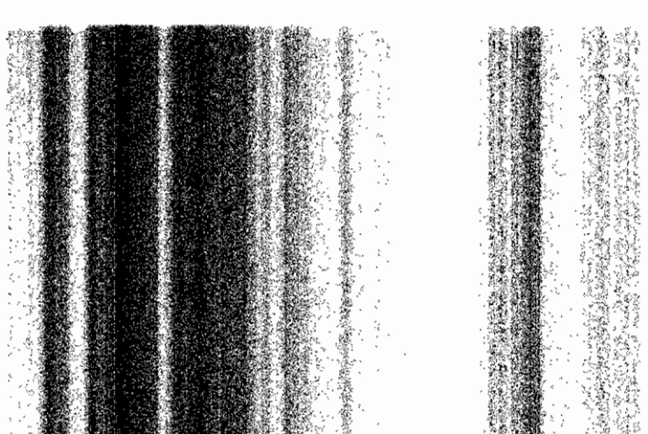
of Plaintiff's past relevant work experience constitutes a misapplication of the legal standard.

C. Plaintiff's Ability to Perform Sedentary Work

1. The ALJ's Rejection of the Treating Physician's Opinion

The ALJ denied Dr. Selassie's opinion controlling weight, pursuant to 20 C.F.R. §404.1527(d)(2), on the grounds that the physician's findings were internally inconsistent and unsupported by objective evidence. The magistrate judge found that the ALJ's decision to deny controlling weight to the opinion of the treating source, Dr. Selassie, was erroneous because it was not supported by substantial evidence.

First, the ALJ found Dr. Selassie's note that "patient finds sitting makes pain better" inconsistent with notes in the same report that prolonged sitting or standing precipitated pain, and that Plaintiff could sit no more than one hour each day. Second, the ALJ found inconsistent Dr. Selassie's finding that Plaintiff had no limitations in "grasping, turning, twisting objects or using her fingers and hands for fine manipulations" but did have limitations doing "repetitive reaching, handling, fingering, or lifting" because repetitive and individual actions are different. Third, the ALJ cited Dr. Patel's finding that Plaintiff could "walk on her heels and toes," and "had no difficulty rising from a chair or the



examination table" and "had no trouble sitting" as contradicting Dr. Selassie's determinations. Fourth, Defendant describes as inconsistent with disability Dr. Selassie's evaluation of Plaintiff's strength during several visits as 5/5.

The ALJ's various findings of inconsistency, listed above, have in common the failure to distinguish discrete from repetitive or prolonged actions. If sitting down can relieve pain, it does not necessarily follow that prolonged sitting would be comfortable. Defendant argues but offers no evidence that Dr. Selassie's report that Plaintiff has "no limitations" grasping, turning, or twisting objects would normally have noted difficulties with repetitive actions if they existed. Without this assumption, the Plaintiff's ability to perform certain actions singularly but not repetitively does not constitute an inconsistent assessment. While Dr. Patel found Plaintiff able to perform certain actions, the overall assessment, as opposed to the discrete observations listed by the ALJ as creating inconsistency, show Plaintiff to have physical limitations that will prevent her from working, in accordance with Dr. Selassie's assessment. Similarly, that Plaintiff displayed strength of 5/5 on some visits is consistent with someone able to perform isolated, but not repetitive or sustained, actions. Moreover, Plaintiff's isolated capacities are all consistent with Dr. Selassie's prediction that Plaintiff would have "good days" and

"bad days." Absent the ALJ's collapse of the distinction between single motions and repetitive or sustained actions, the record does not show internal inconsistencies that would warrant denying controlling weight to the treating physician's opinion.

By denying controlling weight to the treating physician's assessment on the basis of the above findings of inconsistency, the ALJ failed to consider the full extent of the record. Accordingly, this Court finds that the ALJ's decision was not supported by substantial evidence.

2. Plaintiff's Subjective Complaints of Pain

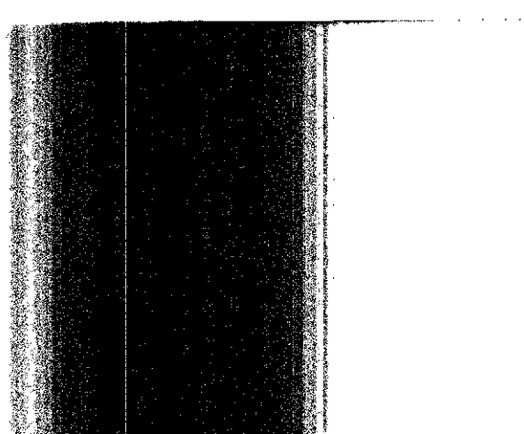
The Magistrate Judge found that the Plaintiff's testimony was in fact consistent with the treating source's findings and that the ALJ erred by focusing on Plaintiff's physical impairments rather than her limitations due to pain. In doing so, the magistrate judge found that the ALJ improperly substituted her own judgment for that of the treating physician. See Doyle v. Apfel, 105 F. Supp. 2d 115, 121 (E.D.N.Y. 2000).

Defendant argues that pursuant to 20 C.F.R. § 404.1529, the ALJ correctly evaluated the Plaintiff's subjective pain in relation to objective medical findings and other evidence, such as the reports of Doctors Patel, Lee, and Selassie. Defendant argues that (1) Dr. Lee found only minimal pain at the end ranges of Plaintiff's motion and Dr. Patel found only slightly restricted ranges of motion; (2) the ALJ's

discounting of Plaintiff's reported fatigue in response to medication was supported by Plaintiff's ability to take short walks, do some chores, and occasionally attend church, and that the medication problem had not been mentioned by Doctor Lee.

"[T]he subjective element of pain is an important factor to be considered in determining disability." Mimms v. Heckler, 750 F.2d 180, 185-86 (2d Cir. 1984). Subjective pain may establish disability even in the absence of "positive clinical findings or other 'objective' medical evidence." Donato v. Sec'y of Dep't of Health and Human Servs., 721 F.2d 414, 418-19 (2d Cir. 1983) (quoting Marcus v. Califano, 615 F.2d 23, 27 (2d Cir. 1979)). The presence of subjective pain can support a finding of disability when "medical signs and laboratory findings . . . show that the claimant has a medical impairment(s) which could reasonably be expected to produce the pain." Snell v. Apfel, 177 F.3d 128, 135 (2d Cir. 1999) (quoting 20 C.F.R. § 404.1529(a)).

As with the physicians' reports, the inconsistencies the ALJ found between Plaintiff's subjective symptoms and the objective medical findings are reconcilable. That Plaintiff can take short walks and with effort do some chores is consistent with fatigue. Pain and limited range of motion are consistent with the inability to do repetitive or prolonged tasks that can be executed in isolation. Rather than using Plaintiff's



subjective symptoms to supplement the objective medical evidence, the ALJ discounted whatever subjective symptoms differed from Plaintiff's direct physical impairments. The ALJ also impermissibly substituted her own medical judgment for that of the physicians, deciding, for example, that if Plaintiff is drowsy, her medications could be adjusted or changed, concluding, "I find no medical need to sleep all day." (R. 15). In discounting the effects of Plaintiff's subjective symptoms such as pain and drowsiness, the ALJ substituted her own judgment for that of the physicians. Accordingly, the ALJ failed to apply the appropriate legal standard.

D. Post-Remand Action

The magistrate judge found that this case should be remanded solely for the calculation of benefits on the grounds that remand for further review of evidence by the ALJ would serve no useful purpose. According to the Magistrate Judge, further development of the record would not change the outcome because the ALJ's errors were caused not by an incomplete record, but rather by the misapplication of the legal standards to the existing record such that a conclusion contrary to substantial evidence was reached.

Defendant responds that allowing the ALJ to review evidence submitted after the 2004 judgment would allow the ALJ to

complete step five of the disability analysis pursuant to 20 C.F.R. §404.1520.

The court may remand solely for calculation of benefits when "the record provides persuasive proof of disability and a remand for further evidentiary proceedings would serve no purpose," Arroyo v. Callahan, 973 F. Supp. 397, 400 (S.D.N.Y. 1997), or when "application of the correct legal standard could lead to only one conclusion," Schaal, 134 F.3d at 504 (internal quotations omitted). Also relevant is the amount of time that has elapsed since the claimant's application for benefits. Balsamo, 142 F.3d at 82 (four years claimant had waited and the prospect of further delay taken into account in remanding solely for calculation of benefits); Rivera v. Sullivan, 923 F.2d 964 (2d Cir. 1991) (length of the litigation is taken into account in the decision to remand solely for the calculation of benefits); Yoxall v. Apfel, No. 3:99-CV-656 SRU, 2001 WL 539608, at *21 (D. Conn. Mar. 30, 2001) (decision to remand solely for calculation of benefits took into account that over four years had passed since Plaintiff's application for benefits); Carroll v. Sec'y of Health and Human Servs., 705 F.2d 638, 644 (2d Cir. 1983) (case remanded solely for calculation of benefits where claimant had waited four years since applying for benefits, in order to "foreshorten the often painfully slow process by which disability determinations are made"). And another factor to be

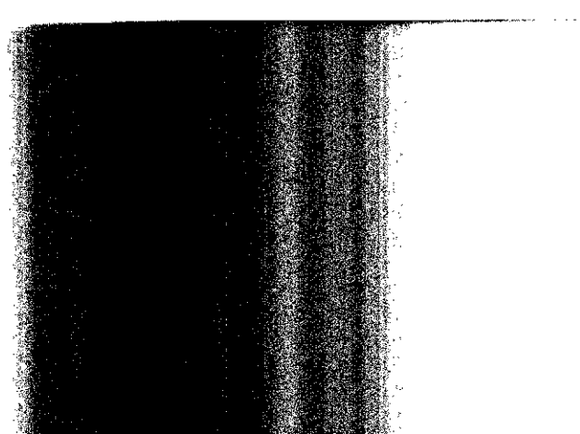
considered is the extent to which the ALJ interpreted largely coherent aspects of the physician's assessment as inconsistencies, allowing the denial of controlling weight to the treating physician's opinion. Vargas, 898 F.2d at 296 (court's decision to remand solely for the calculation of benefits noted the "grudging manner" with which the ALJ "ignored or misinterpreted" the physician's report).

Based on the findings of Plaintiff's treating specialist, Plaintiff is unable to sit for more than one hour or stand/walk for more than an hour, and every ten to fifteen minutes must get up and move around for fifteen to thirty minutes. That Plaintiff's symptoms make it difficult to concentrate and remain sedentary and will make her absent from work more than three times a month is uncontradicted. Additionally, the ALJ at times relied upon an incomplete and inaccurate depiction of the record to support her conclusions. For example, the ALJ supported her decision by noting that while Plaintiff "stated that she needed a cane to walk . . ., Dr. Patel reported that she was able to walk on her heels and toes." (R. 15.) The ALJ neglected to mention Dr. Patel's accompanying statement that Plantiff's gait "is antalgic" and that she "limps on her right side." (R. 75.) Applying the proper legal standard to all the evidence in the record, considering the treating physician's opinion as controlling, and in light of Plaintiff's age and education,

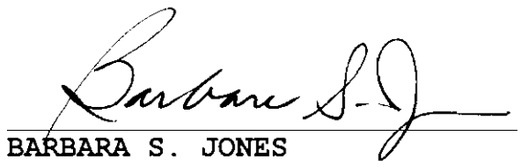
these conditions strongly support the conclusion that Plaintiff cannot perform any sedentary work available in the national economy. It has been more than five years since Plaintiff applied for SSI disability benefits. Critically, Defendant points to no specific portions of the record requiring further development and offers no evidence that review of the record will serve any useful purpose. Accordingly, the Court finds that the record amply demonstrates that a remand to further develop the evidentiary record would serve no purpose and that it is therefore appropriate to remand solely for the calculation of benefits.

Conclusion

For the aforementioned reasons, the Court agrees with the magistrate judge that (1) the ALJ failed to apply the correct legal standard in determining the Plaintiff's past relevant job description and activity level; and (2) the ALJ's decision to deny controlling weight to Dr. Selassie's opinion is not supported by substantial evidence. Dr. Selassie's opinion, once given controlling weight, precludes a finding based on substantial evidence that the Plaintiff could perform a full range of sedentary work in the national economy. Accordingly, the Court finds erroneous the ALJ's classification of Plaintiff as "not disabled" and adopts the Magistrate Judge's R&R. This matter is remanded to the ALJ for the calculation of benefits.



SO ORDERED:



BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
October 5, 2007